No. 91-905

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

WILLIAM P. BARR,
Attorney General of the United States, *et al.*,
Petitioners,
v.
JENNY LISETTE FLORES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICI CURIAE* CHILD WELFARE LEAGUE OF AMERICA AND DEFENSE FOR CHILDREN INTERNATIONAL—USA IN SUPPORT OF RESPONDENTS

JOHN R. HEISSE, II
PETIT & MARTIN
101 California Street
35th Floor
San Francisco, CA 94111
(415) 434-4000

J. MICHAEL KLISE *
CLIFTON S. ELGARTEN
SHARON A. SNYDER
CROWELL & MORING
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2595
(202) 624-2629
Attorneys for Child Welfare League of America and Defense for Children International-USA
* Counsel of Record

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QUESTION PRESENTED

Whether the Immigration and Naturalization Service may incarcerate and detain a child pending a deportation hearing, without a prompt, individualized determination that detention is in the child's best interests, including the determination that it is not in the child's interest to release the child to a responsible adult other than a close relative or legal guardian?

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INTEREST OF *AMICI CURIAE*

The Child Welfare League of America ("CWLA") is a 70-year-old organization comprising over 630 child welfare agencies from across the United States. Together with the 150,000 staff members from its member agencies, CWLA works to ensure quality services for over two million abused, neglected, homeless, and otherwise troubled children, youth, and families. Although not opposed to all institutional placements of children, CWLA believes that the detention of children under the circumstances of this case is inconsistent with the interests of the children and sound child welfare policy.

Defense for Children International-USA ("DCI-USA"), the U.S. section of Defense for Children International ("DCI"), is a not-for-profit corporation engaged in the promotion of children's fundamental human rights, as recognized in the Convention on the Rights of the Child and the World Declaration on the Survival, Protection and Development of Children. DCI has national member sections in approximately 35 countries and has consultative status with the United Nations Economic and Social Council and with the United Nations International Children's Emergency Fund. National sections of DCI are charged with attending to the particular situation of immigration and refugee children in their own countries. As part of its activity in this area, DCI-USA has participated in the Working Group that has met regularly with representatives of the Department of Justice and the Immigration and Naturalization Service ("INS") regarding the problem of detention of undocumented, unaccompanied children entering the United States.

CWLA and DCI-USA both have a compelling interest in ensuring that children, such as those represented here, are not institutionalized in the absence of an individualized determination that detention is in their interest—and that release to a willing and responsible adult is not.*

STATEMENT

Amici adopt Respondents' Statement of the Case and seek to emphasize only a few points which will help to clarify the legal issues before the Court and the factual record upon which the Court's determination must be based.

1. This case involves incarceration and confinement of children. Although the government tries to characterize the detention it imposes on these children as somehow beneficial, there is no mistaking the fundamental difference between incarceration and physical freedom. Incarceration involves the loss of the most basic freedoms. For

* The parties' letters of consent have been filed with the Clerk.

the child it may have a devastating psychological effect. And beyond the physical loss of freedom, and the attendant psychological and emotional effects of confinement, even the most idealistic institutionalization plan poses additional problems. Where the government attempts to administer the institution, subject to budgetary and bureaucratic limitations (and where the inmates are members of a disfavored class), the potential for good intentions to evolve into inadequate facilities, indifference to inmate needs, neglect, and even abuse, is great. The record developed in this case demonstrates the point.[1]

2. The government does *not* here try to advance the general proposition that children who are not in the custody of a parent or legal guardian ought to be, absent compelling circumstances, rounded up and granted the "benefits" of institutionalization of the kind which the INS provides these alien children. No serious contention has or could be made that as a general rule children *not*

[1] As shown in Respondents' Brief, the record demonstrates that these children have been kept by the INS in facilities with unrelated adults where they must share sleeping quarters, bathrooms and other common areas with adult prisoners, without the provision of adequate educational and recreational facilities and equipment, often in facilities secured by barbed wire, security fences and automatic locks, where the major form of activity is TV watching and standing in line to make collect telephone calls.

For the portrait of detention it seeks to paint, the government relies largely on the terms of a settlement agreement it entered into at an early stage of this very litigation. Pet. Br. at 11-12. But if the history of institutional litigation in this country teaches anything, it teaches that the reality of institutionalization rarely lives up to the promise of any regulatory scheme. That is one reason why freedom, rather than institutionalization, should be the rule.

Public record materials presented to the court of appeals below documented well that current conditions remain harmful to children. Children are still being held in handcuffs and shackles, receiving inadequate food, and subject to arbitrary punishment. *See* California Legislature, Joint Committee on Refugee Resettlement, International Migration and Cooperative Development, *Joint Interim Hearing on Impact of INS Policies and Reforms* (July 19, 1990).

in the custody of a close relative or guardian, but in the care of some other responsible adult, are better off being institutionalized in the manner at issue here.

3. These children have been arrested, in essence, on suspicion of being deportable, but not yet adjudged deportable. And as the Respondents make clear, the record is undisputed that many of them will remain in confinement *for up to a year* before any final determination is made. Many of them will never be deported at all; some of them will be found to be citizens.. In the interim, as the court below found and as the INS Regional Director admitted, the class of children before the Court pose no risk of flight before their deportation hearings, no threat to the community or themselves, and have not been charged with any criminal conduct or wrongdoing. *Flores v. Meese*, 942 F.2d 1352, 1354 (9th Cir. 1991) (*en banc*). Put most simply, in the eyes of the law these children are innocent and could not be held under any rationale *previously* recognized by this or any other court for maintaining an individual in custody pending trial.

4. So far as the recent cases of this Court reflect, no ~~extended~~ or serious deprivation of physical liberty has ever been permitted absent an *individualized* determination[2] that such a deprivation is necessary to further a particularized and important interest of the government. This case involves the refusal of the government to make such an individualized determination.

5. Instead of weighing the best interests of the particular child in an individualized way, the government

[2] Indeed, the only cases in which this Court has tolerated a class-based deprivation of liberty, without an individualized and particularized showing that the loss of liberty was necessary to further an important state interest, were in time of war. In the Japanese internment cases, a class-based detention was upheld as a permissible exercise of the government's war power. *Korematsu v. United States*, 323 U.S. 214 (1944). *See also Moyer v. Peabody*, 212 U.S. 78, 84-85 (1909).

has declared *ipse dixit* that where there is no parent, close relative, or legal guardian available, the child may not be freed. The government asserts that its *parens patriae* authority allows it to declare that institutionalization is in the child's best interest. No serious contention is made, however, that this is true, as a matter of fact, with respect to most, let alone all of the children. The record established in the court below shows beyond peradventure that it is *not* true with respect to many of the children who are detained, who by the government's own admission come from diverse countries and backgrounds and may suffer from a variety of physical deprivations and psychological and emotional disabilities.[3] Thus, despite the assertion by the government that this deprivation of liberty is in the children's best interest, in a substantial number of cases, indeed most cases, the children who are confined by the government would be far better off if released to responsible adults.

6. The government's ultimate justification, therefore, takes the form of an assertion of administrative convenience. It couples this interest with the anomalous assertion that its *parens patriae* authority allows it to elevate its own administrative convenience over the individual child's best interest. The number of children involved, which the government claims justifies this administrative convenience rationale, only serves to emphasize how much harm is done by the current rule.[4] Moreover, while it is

[3] A study cited by Petitioners (Pet. Br. at 8 n.12; 12 n.16) and lodged with the Court found that many of these children are physically or emotionally scarred by civil strife in their home countries, and have seen family members and friends killed, threatened or sexually assaulted, and homes and schools damaged or destroyed. Nestor P. Rodriguez & Ximena Urrutia-Rojas, *Undocumented and Unaccompanied: A Mental-Health Study of Unaccompanied, Immigrant Children from Central America* 1-4, 27-34 (1990) (Monograph, University of Houston) (*"Undocumented Children Study"*).

[4] The government states in its brief that the INS took custody of 8542 children pending hearings on their deportability in 1990. While the government did not then keep records as to the number

undoubtedly in some sense *easier* to detain these children indefinitely, rather than look to their particular circumstances, it is certainly no more costly to give them a hearing than it is to institutionalize them for months on end. Perhaps more to the point, this Court has *never* authorized a substantial loss of physical liberty on the basis of a claim that affording a modicum of due process protection would be troublesome or inconvenient to the government.

7. Although the government is at pains to paint the decision below as aberrational, the court below did nothing more than recognize that if the government seeks to justify a detention as in the child's best interest, then that detention may not be imposed without specific consideration of that interest—including attention to the propriety of release to a qualified adult willing to assume responsibility for the child. The court explained that although the INS may "determine on the basis of the particular case whether release of the child poses a danger to the community or could result in harm to the child, the blanket refusal to make individualized determinations in the guise of administrative expediency cannot pass constitutional muster." *Flores*, 942 F.2d at 1363. Thus, the only new requirement placed on the INS was that it determine whether release of the child to a responsible adult who offers to take custody would represent a danger to the child's well-being. *Id.* at 1364.

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of children who were unaccompanied by relatives, records from the Southern Region indicate that 73% of the 1259 children detained in South Texas in 1989 were unaccompanied. Pet. Br. at 8-9. Before 1984, the INS, like every other federal agency, was willing to release children to responsible adults, even if not closely related. INS changed its policy, not based on any enlightenment it received about the best interest of the children but as a direct result of what it perceived as a surge in alien children entering the country without their parents. Pet. Br. at 8-9.

SUMMARY OF ARGUMENT

Freedom from physical confinement is the core of constitutionally protected liberty. The most basic notions of due process rest on the premise that if the government is to imprison a person, the government must show that there is some compelling reason for the imprisonment. The government may incarcerate an individual only where it has made a determination that the incarceration of that individual serves a compelling government interest. If a class of persons is to be detained, then the government must show that it has an interest in incarcerating each and every member of that class. Generalities will not suffice.

Each of these children has a presumptive right to be free unless the government presents some sound reason why he or she should not be free. The burden is always on the government to justify incarceration. The issue in this case is whether the government has established procedures which ensure that it has met *its* burden *in each case* of showing that some reason actually exists for denying these children their basic freedom.

It is well-established that aliens may be detained pending deportation proceedings if it is determined that they pose a risk of harm to national security, a danger to the community, or a risk of flight. None of these interests is asserted as justification for the detention in this case. Instead, the government asserts a *parens patriae* interest in protecting the welfare of these children. But under the circumstances here, due process requires that the government demonstrate, on an individualized basis, how that interest is served by the institutionalization of the child.

INS has attempted to replace the required individualized determination about the interests of the child with a blanket—and factually insupportable—generalization about the persons to whom release would be appropriate and in the child's best interest. Even assuming that it

is permissible in some cases to incarcerate by generalization, that generalization must, as a factual matter, reflect and closely parallel whatever the government asserts in the first instance as its rationale for incarcerating that individual.

In fact, the rule that the government has adopted here incarcerates children when it is not in their best interest not just in *some* cases, but in the vast majority of cases. There is quite literally no evidence to support INS's intuition that release of a minor to a responsible adult will result in harm to the child. To the contrary, there is true consensus that children should be detained only upon a reasoned determination that confinement is necessary. Release to the custody of responsible adults is virtually always preferable to institutionalization. Unnecessary detention, imposed with no determination of the individual child's needs, can cause substantial physical, psychological, and emotional harm.

Given the government's asserted rationale for maintaining these children in custody, the court below did no more than hold that these children were entitled to an individualized determination that maintaining them in custody was, in fact, in their best interest—and releasing them to competent adults, willing to assume responsibility for them, was not. The procedures prescribed by the court below required nothing more than that the children not be deprived of their fundamental liberty without consideration of that issue.

ARGUMENT

I. CHILDREN HAVE A FUNDAMENTAL SUBSTANTIVE RIGHT TO FREEDOM FROM GOVERNMENTAL INCARCERATION AND DETENTION.

A. This Case Involves A Deprivation Of Physical Freedom, A Liberty Protected By The Due Process Clause.

This Court has long held that due process under law contains a "substantive component . . . that protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them.'" *Collins v. City of Harker Heights*, 112 S. Ct. 1061, 1068 (1992) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). Although there is room for debate at the margins, there is no doubt that freedom from physical restraint is one of the core interests protected by the terms of the Due Process Clauses of the Fifth and Fourteenth Amendments. The government here professes some confusion about the nature of the substantive right at stake. Yet that right is the most basic and fundamental of all: the individual's strong interest in physical liberty, which was central to the Framers' design. "Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 112 S. Ct. 1780, 1785 (1992) (citing *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982)). *Accord Board of Pardons v. Allen*, 482 U.S. 369, 373 n.3 (1987) ("liberty from bodily restraint is at the heart of the liberty protected by the Due Process Clause").[5]

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[5] Although the government notes that this Court has cautioned against an expansive view of the rights protected under the heading of substantive due process, the government does not dispute that such rights exist and that freedom from physical restraint is close to its core. Nor could the government argue that "due process is merely procedural." If a law were passed giving some government

The initial court of appeals panel that considered this case made a fundamental mistake when it attempted to redefine the claim of the children here as one seeking recognition of a "fundamental right" "to be released to an unrelated adult," *Flores v. Meese*, 934 F.2d 991, 1006 (9th Cir. 1990), and thus concluded that any rule with a rational relationship to a legitimate government interest would suffice to justify incarceration. The Due Process Clause focuses on whether there has been a deprivation of "life, liberty or property without due process of law."[6] Here, basic liberty is at stake—a right to freedom that is itself "fundamental." It is not the individual's burden to show that he or she should be *released*. Rather, it is always the *government*'s burden to show that there is a good and sufficient reason for the individual to be confined.

B. The Government Has A Legitimate Interest As *Parens Patriae* In Seeking To Act In The Child's Best Interest.

The constitutional protection against physical constraint is, of course, not absolute. Indeed, it is perhaps better phrased as a right to be free from confinement absent the demonstration by the government of good and sufficient reasons for the confinement. Thus, in support of

official the power to imprison those who were undesirable—albeit only after a full adversarial hearing—there would be no question but that such a law could not be sustained, notwithstanding the procedural protections. Substantive due process means that the government cannot deprive an individual of physical liberty without good reason actually found in the case before it.

[6] As this Court recently explained:

> In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the "deprivation of liberty" triggering the protections of the Due Process Clause.

DeShaney v. Winnebago County Social Servs. Dep't, 489 U.S. 189, 200 (1989).

certain well-recognized interests, the government may indeed physically constrain the liberty of an individual. To choose the most obvious example, a finding that an individual is guilty of violating the criminal laws has always been recognized as providing a basis for incarceration. In addition, the Court has recognized that pretrial detention can be justified in certain circumstances, such as when necessary to ensure the presence of the defendant at trial, upon a specific finding relating to that determination—the bail hearing. Similarly, this Court has allowed the detention of individuals "who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel." *United States v. Salerno*, 481 U.S. 739, 755 (1987). *See also Schall v. Martin*, 467 U.S. 253 (1984) (post-arrest detention of juveniles who present a danger to the community).

Despite these recognized exceptions, the fact remains that in "our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Salerno*, 481 U.S. at 755. If a deprivation of physical liberty is not justified by a "compelling governmental interest," *id.* at 748, 750, then it is forbidden "regardless of the fairness of the procedures used to implement [it]." *Foucha*, 112 S. Ct. at 1781 (quoting *Zinermon v. Burch*, 494 U.S. 113, 125 (1990)). Only where the government demonstrates a compelling interest in continued detention does the interest of the individual in continued liberty give way.

This case involves none of the concerns that have heretofore been thought to justify continued detention pending trial. The class of children granted relief here are not dangerous and would be found, if released, to appear at any required hearing. *See Flores*, 942 F.2d at 1357. Thus, the government seeks to justify the detention of these children citing a rationale that has never been used, without more, to justify pre-trial detention. The

government asserts that the detention is in the best interest of the children themselves and that it has so determined under its authority *parens patriae*.

Neither *amici*, nor the court below, have questioned the legitimacy of the government's interest in the welfare of these children or the notion that on a given set of facts, that interest might be viewed as compelling. And indeed, in a variety of contexts it has been recognized that the State may justify the detention of an individual for that individual's own good. But the government's invocation of the child's interest as its own only begins the inquiry, for it merely identifies the basis on which the government seeks to justify confinement. It remains the burden of the government in every case to show on the facts of every case how the interest it asserts is actually served by depriving an individual of his or her basic freedom from confinement.

C. Due Process Requires That Any Deprivation Of Physical Liberty Be Supported By An Individualized Determination.

If the rationale for continued confinement is that it serves the child's best interest—as the government asserts here—then it is the government's responsibility to make that determination with respect to each child whom it would confine and afford each child the opportunity to refute it. That is because confinement which has *not* been justified is a deprivation of due process. *See Addington v. Texas*, 441 U.S. 418, 426 (1979) (State has *parens patriae* interest in caring for the mentally ill but "*no interest* in confining individuals involuntarily if they are not mentally ill or if they do not pose some danger to themselves or others") (emphasis added).

This principle—that the government can justify physical confinement only by demonstrating that the compelling interests which the government asserts would, in fact, be furthered by the confinement—is implicit in each

of the cases described above addressing pre-trial detention. Where the justification for detention asserted by the government is "dangerousness," then the dangerousness of the individual must be shown; where it is "flight," then the likelihood of flight on the part of the individual must be shown, as in a bail hearing; where it is dangerousness to himself, as in the case of a mental patient, then that dangerousness must be shown in the individual case. Thus, for example, a person cannot be involuntarily committed to a psychiatric institution absent a specific showing, on an enhanced burden of proof, that he is dangerous to himself or others. *Addington*, 441 U.S. at 425-27. And in immigration cases, the government must make "some level of individualized determination" before it imposes conditions on release bonds pending the alien's deportation hearing, *INS v. National Ctr. for Immigrants' Rights*, 112 S. Ct. 551, 558-59 (1991), and can detain an alien only upon a showing that he is a "threat to national security or is a poor bail risk." *Matter of Patel*, 15 I&N Dec. 666 (BIA 1976), *cited in O'Rourke v. Warden, Metropolitan Correction Ctr.*, 539 F. Supp. 1131, 1135 (S.D.N.Y. 1982). A deprivation of an individual's liberty must rest on a sound factual basis specific to the person whose liberty is to be taken, and not on mere generalizations about a class of persons. The decision of the court below does nothing more than assure that such an individualized determination is made in every case.

The facts that must be found in each case are the facts that would support the government's interest in continuing detention. If the government, in asserting that it was acting in the best interests of the children involved, was willing in fact to make the determination that confinement was in the *individual* child's best interests, the result below would have been different. But while asserting its *parens patriae* interest generally, and invoking the welfare of children generally, the INS declined to make such an inquiry, substituting in its stead a rule of

administrative convenience that has as its consequence the continued incarceration of many children when such incarceration is patently *not* in the child's best interest.[7]

D. The Prohibition On Release To Responsible Adults Other Than Close Relatives Or Legal Guardians Unduly Circumscribes The Individualized Inquiry Which The Due Process Clause Requires.

The INS's detention policy lacks "fundamental fairness" in a fundamental way: it predicates detention not on an inquiry about the individual child's best interests, but on a *generality* about his or her supposed interest. The rule the INS has adopted predicates release on the availability of an adult custodian who either (1) falls within INS's narrowly drawn class of *per se* acceptable relatives or (2) successfully negotiates the local requirements for legal guardianship (8 C.F.R. § 242.24(b)(1)). That rule could be, at most, a surrogate for—an approximation of—the particular child's best interest. In fact, it is not even that.

The government is apparently of the view that in some cases the child's best interest will not be served by release to a nonrelative who is willing to take responsibility for the child. But in truth, in a large number of cases, such release is, in fact, in the child's best interest. The effect of the government's rule is that in every such

[7] Indeed, the government's brief undercuts its blanket policy by admitting that the interests vary from child to child. As a study that INS cites makes clear, the children differ widely in age, nationality, and psychological condition, all of which can bear on determining whether a given child's welfare is better served by release or detention. Pet. Br. at 8 n.12; 12 n.16 (discussing *Undocumented Children Study*). It may be, as INS suggests (Pet. Br. at 11), that the interests of some of these children will best be served by detention, if it conforms to the standards established by the Alien Minors Shelter Care Program of the Community Relations Service, U.S. Department of Justice, 52 Fed. Reg. 15,569 (1987), *reprinted in* Pet. App. at 152a-167a. But even on the government's terms, it does not follow that all will benefit from it.

case, a child is kept incarcerated wrongfully, where there exists no legitimate government interest in restricting the child's freedom.

The need for individualized determinations applies with particular force to children, because they enjoy a "unique" status under the law. *Bellotti v. Baird*, 443 U.S. 622, 633 (1979). As this Court has recognized, childhood "is a time and condition of life when a person may be most susceptible to influence and to psychological damage." *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982). Therefore, the government's duty must be determined with "sensitivity and flexibility," out of concern for children's "peculiar vulnerability" during their formative years. *Bellotti*, 443 U.S. at 634.[8] Given the possibility that Respondents, who are merely suspected of being deportable, will remain here permanently, the government has a long-term stake in protecting them against the physical, emotional, and psychological consequences of unnecessary detention.[9]

In asserting its *parens patriae* authority in support of its current rule, INS effectively seeks to exploit the children's special status under the law. The rule and prac-

[8] Whereas adults might be capable of rationalizing their own detention, children typically "respond to any threat to their emotional security with fantastic anxieties, denial, or distortion of reality, reversal or displacement of feelings—reactions which are no help for coping, but rather put them at the mercy of events." Joseph Goldstein *et al.*, *Beyond the Best Interests of the Child* 12 (1973). They "come to see society at large as hostile and oppressive and to regard themselves as irremediably 'delinquent.'" *Schall*, 467 U.S. at 291 (Marshall, J., dissenting) (citing Aubry, *The Nature, Scope and Significance of Pre-Trial Detention of Juveniles in California*, 1 Black L. J. 160, 164 (1971)).

[9] *Cf. Plyler v. Doe*, 457 U.S. 202, 226 (1982) ("a State cannot realistically determine that any particular undocumented alien child will in fact be deported until after deportation proceedings have been completed. It would of course be most difficult for the State to justify a denial of education to a child enjoying an inchoate federal permission to remain.").

tice the INS has adopted forecloses inquiry into the very heart of the matter to be determined, the specific factual basis for depriving *this* individual of his liberty.

Generalities—even well-founded generalities, which the one at issue here is not—ought to have little role in connection with government decisions about imprisonment or detention. If a person is to be detained for a lengthy period because he or she is a member of a class, then the government must have an interest in detaining each and every member of that class.[10] But even if there is some room for administrative rules and factual presumptions in connection with the imposition of physical confinement, the role of such presumptions must be limited. They make sense only where they approximate very closely the government interest that would justify confinement.[11]

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[10] The government's suggestion (Pet. Br. at 25 n.26) that the catalogue of cases in *Salerno*, 481 U.S. at 748-49, justifies detention here is without merit. Only one of the catalogued cases permitted detention absent some form of individualized determination, and that was over 80 years ago in the extreme circumstance of a governor's declaration of insurrection arising out of labor unrest, when the Court found that "[p]ublic danger warrant[ed] the substitution of executive process for judicial process." *Moyer v. Peabody*, 212 U.S. 78, 84-85 (1909).

It might be argued that somewhat greater scope for generalizations as a predicate for confinement are allowed in time of war, or in matters affecting national security. Nonetheless, individualized factual determinations have been the rule. *See, e.g., Ludecke v. Watkins*, 335 U.S. 160 (1948) (determination that the individual is an "enemy alien"); *Carlson v. Landon*, 342 U.S. 524, 537-42 (1952) (denial of bail pending deportation hearing where evidence demonstrated aliens were members of Communist party, based on legislative determination that members posed a threat to nation's security). *But see Korematsu*, 323 U.S. at 218-19.

[11] For example, as noted above, the State might justify the confinement of a mentally ill person on the basis of a finding that such a person is a danger to himself. In aid of that particularized determination a state might adopt a rule that said, for example, that a person who is specifically found to have attempted suicide may be confined for 30 days for their own protection, absent a compelling

The reason why such a close fit is required is that any misfit will likely result in the incarceration of persons who, under the government's own rationale, ought not be incarcerated. To choose an example close to this case, the government might arguably adopt a rule that an alien child should presumptively not be released to a convicted felon, absent good cause. In such a circumstance, preventing the child's exposure to criminal influences would be viewed either (1) in and of itself to be a compelling government interest; or (2) to very closely parallel the interest the government has in protecting the child.

The difficulty with the rule that the government has adopted here is (1) that the government has no interest, compelling or otherwise, in keeping a child from being temporarily supervised by an unrelated, but nonetheless responsible adult; and (2) as shown below, the rule does *not* stand as an acceptable surrogate for an individualized factual determination about the child's best interest. Indeed, the rule results in wrongful deprivations of liberty—i.e. deprivations of liberty that are not in the best interest of the child—not only in some cases, but in most cases. *See infra* part II.

Thus, in defending its policy and practice, the government focuses largely on the wrong question. It argues at length that it has a right to make decisions about the welfare of these children. Pet. Br. at 25-28. But no one has disputed that proposition. The due process problem presented here is that the government has attempted to make such determinations by adopting a general rule that—as the government ultimately concedes—is justified by nothing more than administrative convenience.[12] *Id.*

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reason for release earlier. In such a circumstance, the close parallel between the finding of suicide may be allowed to create a presumption that persons are a danger to themselves, provided each individual is offered the opportunity to show why that presumption ought not be applied in an individual case.

[12] The INS's policy *appears* to vest some discretion in local officials to release children to responsible adults not appearing on the agen-

at 27. Rather than focus on supporting the interest that it claims to uphold—the interest of the child—it disclaims the ability to make that determination, choosing instead to spend its money on maintaining the children in custody at a substantially greater cost.

E. Administrative Convenience Cannot Justify These Blanket Deprivations Of Liberty.

So far as *amici* can tell, administrative convenience has never been allowed to support the confinement of a large class of individuals who otherwise have done nothing to warrant their being confined by the State. Consistent with principles of due process and recognition of children's "peculiar vulnerability," the INS cannot supplant constitutionally protected rights with administrative convenience:

> The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy gov-

cy's list of eligibles, where "unusual and extraordinary" circumstances exist. In practice—as noted in Respondents' brief—those circumstances are never found except when the minor requires medical care. Thus, the standard set forth in the rule does not operate as a mere presumption. But even if it did, it would not be tolerable because it does not reflect the reality. In order to reflect the reality, the presumption ought to run the other way: upon the finding that there is a responsible adult willing to care for the child, the child ought to be released to that adult absent some reason not to release the child. That formulation, which mirrors the standard prescribed by the court below, parallels the *facts* with respect to the best interest of the child.

> ernment officials no less, and perhaps more, than mediocre ones.

Stanley v. Illinois, 405 U.S. 645, 656 (1972).[13] In *Stanley*, the Court held unconstitutional an Illinois statute under which children of unwed parents, upon the death of the mother, were declared wards of the State without any hearing on the father's fitness for custody. The Court held that even if the State's general presumption about the unfitness of unwed fathers was correct, not *all* fathers fell into that category, and that each father should, therefore, have an opportunity to make his case:

> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.

Id. at 656-57. The form of procedure by presumption which the INS applies here is no more protective of core liberty interests than that found invalid in *Stanley*. *See generally Michael H. v. Gerald D.*, 109 S. Ct. 2333, 2340-41 (1989).

The government nonetheless seems to argue that its presumption is justifiable because children are "always in some form of custody," and it is entitled to subordinate the child's interest to the government's *parens patriae*

[13] INS's creation of a procedure to "deal with" the recent influx of alien children (Pet. Br. at 8-9) bears unfortunate resemblance to another body of procedures that this Court has criticized, the juvenile justice system, which

> frequently does nothing more nor less than deprive a child of liberty without due process of law—knowing not what else to do and needing, whether admittedly or not, to act in the community's interest even more imperatively than the child's.

McKeiver v. Pennsylvania, 403 U.S. 528, 544 n.5 (1971).

interest. Pet. Br. at 26-27. But this convenience-driven argument turns *parens patriae* on its head. *Parens patriae* gives the government the authority to act in a given field—here, for example, to assert the best interest of the child as a rationale for its actions—but it does not immunize irrational actions.[14] Neither does it give the government license to subordinate the child's interest to its own. Yet that is what the government has done here, invoking *parens patriae* as the justification for adopting an "accommodation" under which it need not be put to the trouble and expense of making individual determinations that its actions actually serve the child's interests. *Parens patriae* is a grant of authority to preserve and promote the welfare of a child (*see Schall*, 467 U.S. at 265), not to disregard the child's interest in favor of the government's.

II. INS'S DETENTION POLICY DOES NOT CLOSELY PARALLEL A LEGITIMATE GOVERNMENT GOAL.

By any ordinary factual measure, the government's attempt to justify its rule as in the best interest of the child must fail.[15]

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[14] *See, e.g., In re Gault*, 387 U.S. 1, 16 (1967) ("The Latin phrase proved to be of great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance."); *Kent v. United States*, 383 U.S. 541, 554-55 (1966) ("The State is *parens patriae* rather than prosecuting attorney and judge. But the admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness.").

[15] *Amici* do not condemn all forms of detention or other types of residential care for children in a group setting. *Amicus* CWLA, for example, recognizes that residential care which combines a therapeutic environment with integrated treatment, educational, health care and other specialized services can be the most appropriate option for children with special social, psychological, developmental, and/or health problems. CWLA, *Standards for Residential Centers for Children* 15-16 (1982). Further, detention under conditions where there is a demonstrated need for safety and security, and

A. INS's Detention Policy Is Not Reasonably Related To A Legitimate Governmental Interest In The Welfare Of Children.

Despite the government's broad assertion that its rule is intended to benefit the affected children, the government has disdained any offer of factual support for its notion that the detention it provides, and which it describes in near glowing terms (Pet. Br. at 11-13), is actually beneficial, or that release to unrelated but responsible adults is harmful. To the contrary, the genesis of the rule shows that it was made, at most, on the basis of an INS intuition about what was appropriate, rather than any serious consideration of the important issues involved. *See* J.A. at 9-12.

Indeed, if the government were serious in its view that this type of detention were beneficial to children generally, then one would wonder why all children who are not currently in the care of a close relative or legal guardian are not being brought to similar detention centers. The government's practice of affording the benefits of incarceration only to *alien* children is woefully underinclusive.

B. The INS Denies Release To Adults Widely Recognized As Suitable To Care For Children.

The INS allows release of the child to parents, legal guardians, grandparents, brothers, sisters, aunts, and uncles, but not to other responsible adults who are available to serve as custodians. The INS standard thus ignores the value of the extended family in providing care and

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where quality individualized care is provided, can also be an acceptable alternative. However, CWLA disfavors the routine detention imposed by the INS when the needs of the child can best be met through a substitute family or similar community alternative and when the child does not pose a danger to himself or the community.

support for children,[16] placing this admittedly inexpert agency at odds with model standards and federal and state statutes developed on the basis of more informed investigation and study.[17]

For example, the Law Enforcement Assistance Administration Standards on Adjudication limit shelter facility placement to instances in which the juvenile is in danger of imminent bodily harm with no available alternative to reduce the risk, or in which there is "no person willing and able to provide supervision and care" for the juvenile. U.S. Department of Justice, National Advisory Committee for Juvenile Justice and Delinquency Prevention, Standards for Administration of Juvenile Justice, Commentary to Standard 3.153 (1980). These standards authorize release to a "suitable person willing and able to provide supervision and care." *Id.* at 3.153. Similarly, the National Council on Crime and Delinquency ("NCCD") Standards and Guides for the Detention of Children and Youth require a search for persons who would accept responsibility for a child in custody, when parents cannot be located. NCCD 17 A (1961).

The INS's practice is also out of step with the federal statutory standard, 18 U.S.C. § 5034, which requires a

[16] The INS policy fails to recognize the importance of godparents and other nonbiological "family" as responsible adults. In Hispanic family culture, godparents ("padrinos") are nonrelative adults who play a prominent role in the growth of the child, including providing a home for the child in the event of the parents' inability to provide care. Carlos Vidal, *Godparenting Among Hispanic Americans*, 67 Child Welfare 453, 457 (1988). Similarly, the policy fails to allow for assistance from religious organizations, to which many detained children would commonly turn for support. *See* Northwest Research Associates, *Active and Reasonable Efforts to Preserve Families* 28 (1986).

[17] INS Regional Commissioner Ezell admitted having no experience in juvenile justice or detention, and also admitted never consulting federal judicial policies, state juvenile authorities, or anyone with expertise in the field, before implementing the policy. J.A. at 12.

magistrate to release a juvenile offender to "his parents, guardian, custodian, *or other responsible party*" (emphasis added) upon their promise to ensure the youth's appearance at scheduled hearings, and with other model standards.[18] And the statutes of many states, including California's, require the use of the least restrictive alternative for a child taken into custody, and release to responsible adults or community organizations when no parent or guardian is available. Cal. Welf. & Inst. Code § 626(a), (b) (West 1992).[19]

[18] *See* Model Juvenile Court Act § 14 (1985) (child shall not be subject to prehearing detention except to protect person or property of others or child or to prevent flight, or because there is "no parent, guardian, *or custodian or other person* able to provide supervision and care") (emphasis added); *id.* at cmt. (§ 14 is "consistent with not only current juvenile court acts but the modern trend not to hold persons in confinement unless necessary to assure their appearance in court").

[19] The states are assuredly more familiar with these issues. State law is "plainly worth considering in determining whether the practice 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Schall*, 467 U.S. at 268 (quoting *Leland v. Oregon*, 343 U.S. 790, 798 (1952) and *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

State law provides clear direction here: Ala. Code § 12-15-62 (1975) (allowing release to custody of "a parent, guardian, custodian or any other person who the court deems proper"); Conn. Gen. Stat. § 46b-133 (1986) (allowing release to "parent or parents, guardian or some other suitable person or agency"); D.C. Code Ann. § 16-2310 (1981) (allowing release to "parent, guardian, custodian, or other person or agency able to provide supervision and care for him"); Idaho Code § 16-1811.1(c) (1991) (allowing release to custody of "parent or other responsible adult"); Iowa Code § 232.19(2) (West 1985) (release to "parent, guardian, custodian, responsible adult relative, or other adult approved by the court"); Ky. Rev. Stat. Ann. § 610.200 (Michie 1990) (release to custody of "relative, guardian, person exercising custodial control or supervision or other responsible person"); Me. Rev. Stat. Ann. tit. 15, § 3203-A (West 1991) (release to "legal custodian or other suitable person"); Md. Cts. & Jud. Proc. Code Ann., § 3-814 (1989) (release to "parents, guardian, or custodian or to any other person designated by the court"); Mass. Gen. Laws Ann. ch. 119, § 67 (1969)

INS permits release to unrelated adults only if they are legal guardians of the child. 8 C.F.R. § 242.24(a)(1)(ii). The government asserts that release is inappropriate if the adult is "unwilling or unable to take steps necessary to become legal guardians." Pet. Br. at 18. Again, however, the government's focus is wrong. The only legitimate justification for detention is that it serve the child's best interests, not that the custodian has failed to prove his mettle by obtaining guardianship. In any event, guardianship is more akin to permanent custody than to the temporary custody which these children require in the interim between their arrest and their deportation hearings.[20] Because of the permanent consequences of the guardianship determination, it can take weeks to obtain—weeks which, but for INS's blanket rule, a child could spend under the care and custody of a responsible, con-

(release to "parent, guardian or any other reputable person"); Miss. Code Ann. § 43-21-301 (1981) (release to "any person or agency"); Minn. Stat. § 260.171 (West 1982) (release to "parent, guardian, custodian, or other suitable person"); Neb. Rev. Stat. § 43-253 (1988) (release to "parent, guardian, relative, or other responsible person"); Nev. Rev. Stat. Ann. § 62.170 (Michie 1986) (release to "parent or other responsible adult"); N.H. Rev. Stat. Ann. § 169.B:14 (1990) (release to relative, friend, foster home, group home, crisis home, or shelter-care facility); N.J. Stat. Ann. § 2A:4A-32 (West 1987) (release to relative); S.D. Codified Laws Ann. § 26-8-23 (1984) (release to probation officer or "any other suitable person appointed by the court"); S.C. Code Ann. § 20-7-560 (Law. Co-op. 1984) (release to "parent, a responsible adult, a responsible agency of a court-approved foster home, group home, facility, or program"); Tex. Fam. Code Ann. § 52.02 (West 1992) (release to "parent, guardian, custodian, or other responsible adult"); Utah Code Ann. § 78-3a-29 (1992) (release to "parent or other responsible adult").

[20] *See, e.g.*, Unif. Guardianship and Protective Proceedings Act, § 2-104(a) (1982) (court may appoint guardian if all parental rights have been terminated or suspended by circumstances); Ala. Code § 26-2A-73(a) (1991) (same); Ariz. Rev. Stat. Ann. § 14-5204 (1975) (same); N.M. Stat. Ann. § 32-1-58(A) (Michie 1989) (permanent guardianship vests in the guardian all rights and responsibilities of a parent).

cerned adult. Moreover, because many of the adults who come forward to care for these children may be recent immigrants themselves, unfamiliar with our language and customs, it simply is not realistic to expect them to run a bureaucratic gauntlet and acquire legal guardianship to prove their willingness to care for the child.[21]

C. Incarceration And Detention Subject Children To Substantial Physical, Psychological, And Emotional Harm.

Detention is detrimental and should be a last resort, not the disposition of choice. Five decades of research have confirmed that "long term institutionalization in early childhood leads to recurrent problems in interpersonal relationships, high rates of personality disorders, and severe parenting difficulties later in life."[22] North American Council on Adoptable Children, Research Brief 1, *Challenges to Child Welfare: Countering the Call for a Return to Orphanages* 2 (1990).

The duration of detention can correlate with other long-term effects upon children's ability to form close

[21] Nor is a temporary guardianship a viable alternative. At the expiration of the "temporary" period, the guardianship may automatically expire, with no assurance of extension. *See, e.g., In the Matter of the Guardianship of Doe*, 786 P.2d 519 (Haw. 1990) (temporary guardianship may not last longer than ninety days); *Bagonzi v. Miller*, 401 A.2d 1086 (N.H. 1979) (temporary guardianship may not exceed sixty days). There are other state quirks as well. In this very case, for example, the Los Angeles Superior Court declared children in INS detention ineligible for temporary guardians.

[22] Where, as here, a government entity has exceeded the limits of its administrative expertise, courts determining the reasonableness of a policy "must show deference to the judgment exercised by a qualified professional." *Youngberg*, 457 U.S. at 322. Such deference does not constitute judicial policymaking, as INS claims (Pet. Br. at 19), but rather is part and parcel of the need to determine whether the challenged practice violated a "fundamental" right. *See Snyder*, 291 U.S. at 105.

personal relationships, their social maturity, their performance on intelligence and developmental tests, and their ability to function in noninstitutionalized settings. *Id.* at 8-12. Deprivation of a secure attachment relationship with a primary caretaker may permanently impair a child's ability to form attachments, has been linked with poor school performance and delinquency, and may impair the child's intellectual curiosity, personality development, and ability to get along with peers. Michael S. Wald *et al.*, *Protecting Abused/Neglected Children: A Comparison of Home and Foster Placement* 10 (Stanford Center for the Study of Youth Development 1985). Thus, detention can significantly interfere with a child's ability to develop as a normal functioning adult.[23]

Detention also diminishes children's image of their own self-worth. Juvenile justice experts have testified that children are far more vulnerable to emotional pressure than are mature adults. *See Lollis v. New York State Dep't of Social Servs.*, 322 F. Supp. 473, 481 (S.D.N.Y. 1970) (expert testimony). An adult who has not been through the experience has difficulty appreciating "the terror that engulfs a youngster the first time he loses

[23] Detention distorts a child's sense of time. Children may not appreciate the purpose and duration of their detention. "The lack of sensory stimuli, extended periods of absolute silence or outbreaks of hostility, foul odors and public commodes, as well as inactivity and empty time constitute an intolerable environment for a child." Mark Soler *et al.*, *Stubborn and Rebellious Children: Liability of Public Officials for Detention of Children in Jails*, B.Y.U. L. Rev. 1, 6 (1980). Decisions bearing on their detention "should never exceed the time that the child to-be-placed can endure loss and uncertainty." Goldstein, *supra*, at 42. Children have a built-in time sense based on the urgency of their instinctual and emotional needs, *id.* at 40, prompting one court to find it "difficult to reconcile the practice of detaining a child one to six months prior to the juvenile court hearing with the protective philosophy of the juvenile court." *In re Robin M.*, 579 P.2d 1, 3 (Cal. 1978) (quoting Governor's Special Study Commission on Juvenile Justice, *Part I—Recommendations for Changes in California's Juvenile Court Law* 28 (1960)).

his liberty and has to spend the night or several days or weeks in a cold impersonal cell or room away from home or family." *In re William M.*, 473 P.2d 737, 747 n.25 (Cal. 1970) (quoting expert testimony). The experience tells the minor that he is "no good" and that society has rejected him, and he responds accordingly, living down to society's seemingly diminished expectations. *Id.* The lack of privacy inherent in detention further communicates to the children that they are "not trustworthy, . . . not responsible, . . . not deserving of being treated with basic dignity . . . and when we communicate to somebody that he is untrustworthy, or not to be trusted, he will engage in untrustworthy behavior." *Morgan v. Sproat*, 432 F. Supp. 1130, 1149 n.40 (S.D. Miss. 1977) (quoting expert testimony). Summing up the problem in the context of the failures of the juvenile justice system, this Court noted that although the system in theory had noble goals, "[i]n fact there is increasing reason to believe that its intervention reinforces the juvenile's unlawful impulses." *McKeiver*, 403 U.S. at 544 n.5.[24]

Besides impairing a child's emotional development and denigrating his image of self-worth, detention also fails to address a child's need for "family." Children, unlike adults, have no psychological concept of relationship by blood tie until late in their development. Instead, "[w]hat

[24] INS's practice conflicts with state judicial recognition of the need for individualized determination to foreclose resort to unnecessary detention. *See, e.g., Jones v. Maryland*, 535 A.2d 471 (Md. 1988) (expressing preference for releasing child to parents, guardian, or other persons instead of detaining him); *Glenda Kay S. v. Nevada*, 732 P.2d 1356 (Nev. 1987) (placement of 13-year-old in training center because of minor offense violated preference for home placement); *R.P. v. Alaska*, 718 P.2d 168 (Alaska App. 1986) (state bears burden of proving that less restrictive alternatives are unavailable); *Morris v. D'Amario*, 416 A.2d 137 (R.I. 1980) (state's placement of arrested child is subject to strict scrutiny to determine whether least restrictive placement used); *In re John H.*, 48 A.D.2d 879, 369 N.Y.S.2d 196 (1975) (state must fully explore options other than detention).

registers in their minds are the day-to-day interchanges with the adults who take care of them and who, on the strength of these, become the parent figures to whom they are attached." Goldstein, *supra*, at 12-13. Unless "family, natural or of the heart, is involved in the treatment and life of the child, it is impossible or at best difficult for the child to be reintegrated into home and community." *Gary W. v. Louisiana*, 437 F. Supp. 1209, 1215 (E.D. La. 1976). Thus, it is important that the law identify "who, among *presently available* adults, is or has the capacity to become a psychological parent and thus will enable a child to feel wanted." Goldstein, *supra*, at 51 (emphasis in text).

III. INS'S INCARCERATION AND DETENTION OF CHILDREN WITHOUT A HEARING VIOLATES THEIR RIGHT TO PROCEDURAL DUE PROCESS.

Because, as we have explained, INS's blanket detention policy without an individualized hearing deprives these children of a substantive due process right, it necessarily follows that the policy denies their right to procedural due process as well.[25] If the child has a substantive right to be released absent a determination that detention is in the child's best interest, then a hearing addressing that

[25] The INS claims that it lacks the administrative resources and expertise to conduct "the home visits necessary to make reliable guardianship determinations." Pet. Br. at 27-28. But the court below did not require INS to engage in a full-scale custodial inquiry, but merely to inquire "whether any non-relative who offers to take custody represents a danger to the child's well-being." *Flores*, 942 F.2d at 1364. The INS offers no explanation why funds currently being used to maintain the detention facilities could not just as readily be used for referral of the children to other persons or agencies, such as licensed youth-serving agencies or recognized church groups, which have the expertise to screen potential custodians. Further, conducting hearings would not impose a new kind of administrative burden. The agency already must make allowance for hearings, because even absent the court order, it must hold a hearing if the child requests one. *See* Pet. Br. at 36.

interest must be afforded shortly after the detention is commenced. *See Flores*, 942 F.2d at 1364.

The government protests, of course, that the child already has an opportunity for a hearing. But as a practical matter, these children have no such opportunity, because obtaining the hearing depends on each child's exercise of mature judgment—precisely the trait whose absence, according to INS, justifies the agency's intervention *parens patriae*. As the INS tortuously puts it:

> [T]he juvenile can choose to forego such a hearing only by declining to check a box that expressly states: "[I] do request a redetermination by an Immigration Judge of the custody decision."

Pet. Br. at 36. In other words, the child waives the hearing unless he specifically requests it, an arrangement that stands the law on its head.

It is the *government's* burden to justify the deprivation of liberty, not the child's to check the "right" box on a piece of paper and thus preserve his right to freedom. A child's waiver of a fundamental right must occur through an uncoerced, affirmative, informed decision, *Kent*, 383 U.S. at 556-57, not through mere omission. The likelihood of invalid waiver is especially high given the circumstances in which it is typically executed: the child will have just been taken into custody in a strange country, probably knows little if any English, may well be illiterate in his native language, and will be highly susceptible to doing whatever he thinks will please his captors, rather than making an informed decision in his own best interests. In prescribing that the issue of the suitability of release to a responsible adult affirmatively be addressed by the INS in every case, the court below did nothing more than prescribe the constitutional minimum necessary to protect the child's interest.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

JOHN R. HEISSE, II
PETIT & MARTIN
101 California Street
35th Floor
San Francisco, CA 94111
(415) 434-4000

J. MICHAEL KLISE *
CLIFTON S. ELGARTEN
SHARON A. SNYDER
CROWELL & MORING
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2595
(202) 624-2629
Attorneys for Child Welfare League of America and Defense for Children International-USA
* Counsel of Record

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